

delay and lack of information provided by Complainants (*i.e.*, the failure to provide maps of their attachments and service territories). As also described above, Complainants' *pro rata* division of costs is also flawed. This was a cable specific inspection and properly chargeable solely to the Complainants, and accordingly properly chargeable in its entirety to Complainants.³⁶³ EAI has attempted to account for and quantify the incidental benefit received by itself and third parties. EAI was not, however, required to do so.

2. The Adjusted Share Model

166. The "adjusted share" model suggested by Complainants is similarly flawed, and consists solely of Complainants' determination that they should not pay for any portion of a line item charge that they do not want to pay. They offer no explanation for why these line items should be eliminated, stating only that they are "improper," nor do they allocate themselves any portion of the costs for these items and tasks from which they clearly benefited.³⁶⁴

167. Equipment, mileage, per diem, lodging and meal charges, however, are standard fees throughout the construction and consulting industries, as established above. In fact, where a USS employee was required to travel to the job site, mileage was only charged for the initial trip and *not* the return trip. Moreover, these charges were incurred solely to benefit the Complainants and solely as a result of the need to inspect their plant to remedy widespread safety violations. Overhead for EAI to process bills was also appropriately charged, as this expense

³⁶³ As a separate matter, there is no precedent that would allow Complainants to import the FCC's assumptions for the average number of attaching entities for rate purposes in addressing inspection charges that solely benefit the Complainants.

³⁶⁴ Complaint at ¶ 276.

was incurred solely due to Complainants' decision to forego direct billing by USS when offered the opportunity.

168. The "deduction" the model takes for pole "inventory" is also flawed. The costs for such an inventory would have been charged to Complainants in any event in the normal course, as they have been charged in the past. Now, by virtue of the safety inspection, an attachment count will not be required for the Cable Operators' attachments. Furthermore, Complainants have failed to establish that the count was defective, and have not offered their own count. The Complaint contains nothing but a naked allegation in the context of this suggested "model" that the count was defective in some unknown respect.

169. Finally, inspection of SBC poles and poles where the Cable Operators have no attachments could have been avoided if service area/facilities maps had been provided as requested. The Commission should not permit Complainants to benefit from withholding information, and then seeking to penalize EAI for seeking out the necessary data. In short, the "adjusted share" model is so fundamentally flawed and unjustified as to serve no practical purpose.

VI. COMPLAINANTS' REQUESTS FOR RELIEF SHOULD BE DENIED

170. The Agency must reject the Cable Operators' attempt to squeeze the facts of this case into precedent that is inapplicable to the current situation under discussion. The extent of their kitchen sink pleading approach is illustrated, for example, by the fact that they are requesting *refunds* for inspection costs, *where they have never remitted a dime to EAI to cover the inspections in question*. Moreover, Complainants are seeking to rewrite the law of damages by

seeking reimbursement from EAI for corrections they have made to their own plant to remedy safety violations, and by seeking unproven consequential damages for theoretical consumers that have allegedly been prevented from receiving service from Complainants due to this dispute. This is particularly ironic given that the Cable Operators have engaged in the worst form of self help by proceeding to make a multitude of unauthorized attachments in areas that they claim EAI has prevented them from serving.

171. Complainants have also failed to support their allegations of "sham inspections," and as is clear from the record, the condition of Complainants' plant is deplorable and must be immediately brought into compliance with applicable safety standards. Complainants have delayed and denied for far too long, and their ongoing attempts to shirk their responsibility towards EAI, their customers, and the public should not be countenanced by the FCC.

172. Complainants' failure to promptly remediate safety violations is an unlawful and unreasonable practice. Moreover, the self-help engaged in by the Complainants, including refusal to repair safety violations and unreasonable delay in addressing disputed case-by-case safety violation determinations, making attachments to distribution and transmission poles without permission, and failing to pay for safety inspections occasioned by documented safety violations and electrical outages caused by Complainants' CATV attachments is a blatant flaunting of the FCC's procedures and misuse of the spirit and intent of the Pole Attachments Act. At every turn, Complainants have disregarded those provisions of the pole attachment agreements and the Pole Attachments Act they found to be inconvenient or not expedient enough for their purposes, and extracted concessions from EAI only to renege and again delay when EAI

sought to implement agreed-upon compromises. Such behavior cannot be tolerated by the Commission.

173. EAI and the electric utility customers of Arkansas should not be subject to the ongoing delay tactics and persistent unsafe conditions of Complainants' plant. Accordingly, pursuant to Sections 224 (b)(1), and 224(f) and 47 C.F.R. § 1.1401 *et seq.*, and based on the foregoing, the FCC should deny the Complaint and find the rates, terms and conditions of attachment are just and reasonable, including, among other terms and conditions,

- a. Require correction of identified safety violations and the use of a case-by-case process for resolving disputed violation determinations, including sign-off by an Arkansas licensed professional engineer;
- b. Require the immediate payment of safety inspection costs allocated according to the EAI formula, plus interest;
- c. Require adherence to the application and permitting process for attachments pursuant to the contract and requiring remediation of violations on poles prior to making new attachments: and
- d. Determine that the pole count that was a necessary by-product of the inspection process is valid, and that back-rental and interest charged is just and reasonable.

VII. RESPONSE TO FACTUAL ALLEGATIONS

174. In this section, EAI responds to the specific factual allegations of the complaint. Each paragraph references the numbered paragraph in the Complaint to which it directly responds.

175. EAI admits that this is a Complaint brought by the named Complainants ostensibly under 47 U.S.C. § 224 and 47 C.F.R. §§ 1.1401 *et seq.* as alleged in **Paragraph 1** of the Complaint.

EAI denies the remaining allegations contained in Paragraph 1 of the Complaint and affirmatively states all actions taken by or on behalf of EAI relating to safety inspections and

Complainants' pole attachments have been in accordance with 47 U.S.C. § 224 and 47 C.F.R. §§ 1.1401 *et seq.*

176. EAI admits the allegations contained in **Paragraph 2** of the Complaint.

177. EAI admits the allegations contained in **Paragraph 3** of the Complaint.

178. EAI admits the allegations contained in **Paragraph 4** of the Complaint.

179. EAI admits the allegations contained in **Paragraph 5** of the Complaint.

180. EAI admits the allegations contained in **Paragraph 6** of the Complaint.

181. EAI admits the allegations contained in **Paragraph 7** of the Complaint.

182. EAI admits the allegations contained in **Paragraph 8** of the Complaint.

183. EAI admits that it owns poles in the State of Arkansas upon which Complainants have made attachments for purposes of wire communications as alleged in **Paragraph 9** of the Complaint. EAI denies that these attachments have been made in accordance with the respective terms and conditions of the pole attachment agreements.³⁶⁵

184. EAI admits the allegations contained in **Paragraph 10** of the Complaint.

185. EAI admits the allegations contained in **Paragraph 11** of the Complaint.

186. EAI admits the allegations contained in **Paragraph 12** of the Complaint.

³⁶⁵ Declaration of David Kelley at ¶ 9; Declaration of Wilfred Arnett at ¶¶ 23-24..

187. EAI has no information as to its pole ownership in relation to other pole owners in the state, and accordingly denies that it is "the dominant" pole owner in Arkansas. EAI denies the remaining allegations contained in **Paragraph 13** of the Complaint.

188. EAI admits that the Complainants find it convenient to use utility poles to attach their cables. EAI is without information sufficient to form a belief as to the remaining allegations contained in **Paragraph 14** of the Complaint and, therefore, denies the same.

189. EAI denies the allegations contained in **Paragraph 15** of the Complaint.

190. EAI is without information sufficient to form a belief as to whether cable operators rarely own their own poles because of local government franchise or zoning restrictions and other legal requirements as alleged in **Paragraph 16** of the Complaint and, therefore, denies the same. EAI denies the remaining allegations contained in Paragraph 16 of the Complaint and affirmatively states that cable operators, in fact, have more than minimal negotiating leverage with pole owners as characterized by the Complainants. Comcast Corporation, for example, boasts that it is "the largest cable operator in the United States" with more than 21.5 million customers and reported revenues of more than 20 billion dollars in 2004.

191. EAI is without information sufficient to form a belief as to whether the most common type of pole which cable operators attach to are wooden poles as alleged in **Paragraph 17** of the Complaint and, therefore, denies the same. EAI admits the remaining allegations contained in Paragraph 17 of the Complaint.

192. EAI admits that EAI sets a pole in the ground at a depth of approximately 10% of the height of the pole plus two feet as alleged in **Paragraph 18** of the Complaint. EAI denies the remaining allegations contained in Paragraph 18 of the Complaint.

193. EAI admits that poles are stabilized before installing facilities and that EAI designs poles so that the electric facilities are at the top of the poles as alleged in **Paragraph 19** of the Complaint. EAI denies the remaining allegations of Paragraph 19 of the Complaint.

194. EAI admits that the portion of a pole below ground is not usable for attachments as alleged in **Paragraph 20** of the Complaint, but affirmatively pleads that the butt of poles have a copper plate with a ground rod for purposes of effectively grounding facilities on poles. EAI denies the remaining allegations of Paragraph 20 of the Complaint.³⁶⁶

195. EAI denies the allegations contained in **Paragraph 21** of the Complaint.

196. EAI is without information sufficient to form a belief as to the allegations contained in **Paragraph 22** of the Complaint and, therefore, denies the same. EAI affirmatively states that the pole attachment agreements contain engineering design specifications to be adhered to by the Complainants for the placement of CATV cable and related CATV facilities.

197. EAI admits that the NESC provides standards for clearances for facilities on the pole, mid-span and from the ground as alleged in **Paragraph 23** of the Complaint. EAI denies the remaining allegations of Paragraph 23 of the Complaint. EAI affirmatively pleads that, by its own terms, the NESC provides the basic or *minimum* provisions necessary for the safety of

³⁶⁶ See Comcast Corp. SEC Form 10-K at pp. 3, 19 (filed February 23, 2005).

workers and the general public and is not a design specification or an instruction manual.³⁶⁷ EAI further pleads that the governing or controlling standards for attachments of aerial CATV plant to poles are the utility's engineering design specifications in every instance.

198. EAI admits that poles and wires are affected by the elements and that these factors are taken into account by the NESC as alleged in **Paragraph 24** of the Complaint. EAI denies the remaining allegations of Paragraph 24 of the Complaint. EAI again pleads that the NESC is the basic or *minimum* provisions necessary for the safety of workers and the general public.

199. EAI admits that it is required by regulation of the Arkansas Public Service Commission to ensure that its electric facilities are properly engineered, constructed and maintained for safety and reliability purposes as alleged in **Paragraph 25** of the Complaint. EAI admits that the Pole Attachment Act of 1978 requires just and reasonable rates, terms and conditions with respect to pole attachments as alleged in Paragraph 25 of the Complaint. EAI denies the remaining allegations of Paragraph 25 of the Complaint.

200. EAI admits that USS was hired by EAI as alleged in **Paragraph 26** of the Complaint, but denies the remaining allegations contained in Paragraph 26 of the Complaint.

201. EAI denies the allegations of **Paragraph 27** of the Complaint. EAI affirmatively states that at the time EAI initially contracted with USS in December 2001, to perform field safety inspections of Comcast's plant (over 7 months from the date EAI first met with Comcast to discuss unsafe conditions of Comcast's cable plant), there were no other contractors in the area of EAI's service territory who were competent or had adequate resources and the experience

³⁶⁷ See Section 1 Paragraph 010. Purpose of the NESC.

necessary to perform accurate, complete inspections of the CATV cable plant.³⁶⁸ EAI also affirmatively states the following.

202. With respect to Comcast:

(i) As a result of continuous and frequent damages to electrical facilities owned by EAI, large numbers of electrical service outages and emergency service calls in the central Arkansas area stemming directly from the condition of Comcast's cable plant, on April 18, 2001, representatives of EAI met with representatives of Comcast, Mark Gardner, Director of Technical Operations, and Bob Green, Construction/Maintenance Manager, to discuss the major problem areas of Comcast's plant.³⁶⁹ In response to this meeting, Mark Gardner and Bob Green submitted a document entitled "Comcast Action Plan" dated April 20, 2001, on behalf of Comcast to EAI (the "Comcast Action Plan").³⁷⁰ The Comcast Action Plan stated that "[d]ue to the upgrade of our plant, we have overlashed cable and added additional strand footage causing clearances to be out of specification in some locations."³⁷¹ Comcast made a commitment to EAI to aggressively inspect all aerial plant in central Arkansas within 120 days beginning April 23, 2001, and to make necessary corrections within 15 days of finding each violation, unless make-ready work was required.³⁷² Comcast also stated that maps of the areas inspected would be maintained at its offices.³⁷³

³⁶⁸ Declaration of David B. Inman at ¶ 11.

³⁶⁹ See Letter from Webster Darling, Senior Counsel, Entergy Arkansas, Inc., to Mark Gardner dated April 19 2001, attached as Exhibit "22." See Comcast Trouble Tickets attached as Exhibit "90."

³⁷⁰ See Comcast Action Plan (April 20, 2001) attached as Exhibit "21."

³⁷¹ See *id.*

³⁷² See *id.*

³⁷³ See *id.*

(ii) To follow up the Comcast Action Plan, Bob Green, Comcast Construction/Maintenance Manager, sent EAI another document dated August 21, 2001, also entitled "Comcast Action Plan" (the "Follow Up Comcast Action Plan").³⁷⁴ Bob Green stated in the Follow-Up Comcast Action Plan that Comcast had performed a complete inspection of all 1,200 miles of aerial plant in central Arkansas at the rate of 14 miles inspected per day, and that Comcast had only found and made corrections at 125 separate locations as a result of this inspection.³⁷⁵

(iii) Despite these representations that Comcast had inspected all of its plant and taken necessary corrective actions, EAI continued to suffer a high incidence of damages to electrical facilities, electric service outages, and emergency service calls as a direct result of the poor condition and shoddy construction of Comcast's plant in central Arkansas.³⁷⁶

(iv) As a result, in September 2001, EAI initially engaged Wilfred Arnett of USS to conduct a random sample of inspection of third-party attachments to EAI poles in the Little Rock area. Significant violations were noted despite Comcast's recent Follow Up Comcast Action Plan in which it indicated it had completed all repairs.

(v) In December 2001, EAI hired USS to perform a field inspection of two circuits in the operations area of EAI in central Arkansas which were representative of EAI's pole plant and electrical facilities for this area. The inspection was performed to determine whether Comcast attachments complied with the requirements set forth in the pole attachments agreements and provisions of the applicable NESC. The scope of the inspection involved measurements solely of Comcast attachments to the closest energized facility at the pole, mid-span clearances of

³⁷⁴ See Follow-Up to Comcast Action Plan (Aug. 21, 2001), Exhibit "23."

³⁷⁵ See *id.*

³⁷⁶ See Comcast Trouble Tickets attached as Exhibit "90."

Comcast cable, proper anchoring and guy wires for Comcast attachments, and proper bonding of Comcast's plant to vertical ground wires. The results of this sample field inspection revealed widespread violations (30% of attachments were in violation) of engineering and construction requirements, some of which not only place EAI's qualified servicemen in danger of electrocution, but also the non-qualified and untrained employees, contractors and subcontractors of Comcast.

(vi) Based on this sample inspection, EAI determined that good cause existed to perform a safety inspection of Comcast's plant in EAI's operations area of central Arkansas. On January 18, 2002, representatives of EAI and USS met with representatives of Comcast to discuss the findings of the sample field inspection and how to proceed with a complete inspection of Comcast's plant in central Arkansas. At this meeting, EAI and USS encouraged Comcast to designate a representative to attend and participate in the inspection, but Comcast flatly refused to participate in any way.³⁷⁷

(vii) USS began the safety inspections of Comcast's plant in late January 2002 following the January 18, 2002 meeting with Comcast. On August 7, 2002, representatives of EAI and USS met again with representatives of Comcast including Ronnie Colvin, Vice President and General Manager, and Mike Wilson, Vice President of Corporate Affairs, to discuss the status of the ongoing safety inspection, the methods of inspection utilized by USS, costs of the inspection that were billed to Comcast, comparative analysis of inspection costs, and findings of violations.³⁷⁸

³⁷⁷ Declaration of David B. Inman at ¶ 8.

³⁷⁸ Declaration of David B. Inman at ¶ 9.

(viii) At that time, USS had inspected approximately 14 circuits involving approximately 3,520 Comcast attachments resulting in 1,121 separate violations of the NESC. EAI and USS once again encouraged participation and cooperation of Comcast in the inspection process and correction of reported safety violations. However, rather than assume a role in the inspection process and begin to correct violations, the representatives of Comcast set on a defensive course of questioning the cost of the inspection, the integrity of the reported violations and the inspection process itself. In fact, during the meeting held on August 7, 2002, when representatives of EAI requested the representatives of Comcast to review a small sample of the serious violations caused by Comcast's attachments within short driving distance of the meeting site, Comcast representatives refused to do so and left the meeting.³⁷⁹

(ix) The scope of this inspection solely involved Comcast's plant in relation to EAI's electrical facilities. The safety inspection, by no means, involved a detailed inventory or inspection of every piece of equipment and attachment on every pole as has been repeatedly alleged without basis in fact by the Complainants and their representatives. Rather, USS was contracted to perform inspections of the cable plant within specific areas of EAI's service territory which suffered continuous damages, outages and emergency calls resulting from poor conditions of the cable plant. Nor was USS hired to conduct a state-wide billing and safety inspection of EAI pole plant also as alleged without basis in fact in Paragraph 26 of the Complaint.³⁸⁰

203. With respect to Alliance:

³⁷⁹ Declaration of David B. Inman at ¶ 10.

³⁸⁰ Declaration of David B. Inman at ¶ 14.

(i) Due to frequent incidences of damages to electrical facilities, electrical service outages and emergency calls experienced by EAI related to the unsafe condition of the cable plant owned by Alliance in the areas of Plumerville and Greenbrier, Arkansas, EAI directed USS to conduct a sample inspection of Alliance's cable plant beginning in July 2002. Prior to this, it was not uncommon for EAI construction personnel to respond to problems caused by Alliance owned facilities once or twice a week.³⁸¹ Almost one year prior to this sample inspection, Brad Welch, Joint Use Coordinator for EAI, discussed with Jeff Browers, Alliance, the need for Alliance to correct its construction and safety violations in Plumerville and Greenbrier. However, Alliance never responded to Mr. Welch's request, and did not take any corrective action whatsoever.³⁸² This sample inspection revealed many violations of provisions of applicable NESC and the construction requirements set forth in the pole attachment agreements.³⁸³

(ii) The results of this sample field inspection were presented to Alliance at a meeting held on September 13, 2002.³⁸⁴ The individuals present at the meeting on behalf of Alliance were John Brinker, Vice President of Operations, Kay Monigold, Chief Operating Officer, and Jeff Browers. The violations included, without limitation, lack of or improper anchors and guy wires, clearance issues, both at the pole and mid-span, and other violations caused by shoddy construction techniques of Alliance.

(iii) EAI explained to the Alliance representatives at this meeting that a complete inspection of the cable plant owned by Alliance in these areas was warranted. EAI asked

³⁸¹ Declaration of Bernard Neumeier at ¶ 18.

³⁸² Declaration of Brad Welch at ¶ 10.

³⁸³ Declaration of Bernard Neumeier at ¶ 20.

³⁸⁴ See Presentation of Meeting with Alliance Communications attached as Exhibit "37."

Alliance to appoint a representative to attend and participate in the safety inspection on behalf of Alliance.³⁸⁵ Alliance initially designated Jeff Browers as its representative to join USS in the inspection. However, when Tony Wagoner came to the offices of Alliance to begin the inspection, Mr. Browers declined to attend or participate in any way.³⁸⁶ The complete inspection of Alliance's cable plant in these areas began in October 2002. Again, the scope of the inspection solely involved cable plant owned by Alliance in relation to electrical facilities.³⁸⁷

204. With respect to WEHCO:

(i) WEHCO was sent numerous letters from EAI beginning in early 1998 concerning unauthorized attachments, attachments which did not meet provisions of applicable NESC, lack of or improper anchors and guy wires, lack of prior notification of attachments, damages to electrical facilities, and outages of electrical service directly caused by WEHCO's cable plant in White County, Arkansas.³⁸⁸ Despite repeated requests made by EAI to Dan Hodges, John Underhill and other representatives of WEHCO regarding its cable plant, EAI continued to suffer damages to facilities and outages of electrical services caused by the poor condition and shoddy construction of WEHCO attachments in White County, Arkansas.

(ii) EAI directed USS to conduct a sample field inspection of WEHCO cable plant in this area beginning in February 2004. Prior to this inspection in January 2004, EAI notified Donny Gaines of WEHCO that this inspection would take place.³⁸⁹ In addition, EAI also notified Charlotte Dial of WEHCO the week of February 2, 2004, about the upcoming

³⁸⁵ Declaration of David B. Inman at ¶ 10.

³⁸⁶ Declaration of Tony Wagoner at ¶ 49.

³⁸⁷ Declaration of David B. Inman at ¶ 13.

³⁸⁸ Declaration of Michael Willems at ¶ 11, Exhibits "46 to 66."

³⁸⁹ Declaration of Michael Willems at ¶ 16.

inspection. Ms. Dial was already aware of the upcoming sample inspection. Donny Gaines and Bill Haynie of WEHCO also contacted Millard Cooper of EAI concerning the inspection. Mr. Gaines also was notified by EAI at the time the inspection was actually being performed by USS. WEHCO not only had prior notification of the sample field inspection, but also ample opportunity to participate in the inspection process and chose not to do so.³⁹⁰

(iii) On March 30, 2004, WEHCO was furnished a full report of the results of the sample field inspection.³⁹¹ Finally, on June 10, 2004, a meeting was held between representatives of WEHCO, USS and EAI to review the results of the inspection and to discuss standards of construction, and corrective actions which must be take by WEHCO. To date, WEHCO has failed to correct many of the reported violations caused by unsafe conditions of its cable plant.³⁹²

205. With respect to Cox:

(i) Other than the rebuild projects undertaken by Cox in Magnolia, Malvern, Jonesboro, Gurdon, and Russellville, Arkansas, involving make-ready design and post-construction inspection work by USS, no other Cox cable plant has been inspected. EAI and USS advised Cox that there was a standing invitation for Cox to participate in the post-inspection work performed by USS, but Cox failed to do so.³⁹³ It is notable that Cox itself hired USS to perform pre-construction and post-construction inspections, make-ready design engineering and

³⁹⁰ Declaration of Michael Willems at ¶ 16.

³⁹¹ See Report of WEHCO Sample Field Inspection attached as Exhibit "84."

³⁹² Declaration of Wilfred Arnett at ¶ 37.

³⁹³ See E-Mail from Bob Arnold, USS Project Manager, to Rod Rigsby, Cox, dated April 24, 2003 attached as Exhibit "38."

construction for the rebuild project in Jonesboro, Arkansas after the project was shut down due to the shoddy construction practices of the initial contractor hired by Cox.

206. EAI denies the allegations contained in **Paragraph 28** of the Complaint.

207. EAI denies the allegations of **Paragraph 29** of the Complaint. EAI affirmatively states that the scope of inspection performed on behalf of EAI was designed for the sole purposes of determining whether cable attachments and plant construction complied with the engineering specifications under the pole attachment agreements and requirements set forth in applicable NESC. USS was engaged by EAI to inspect specific service areas of EAI and not for a state-wide inspection. The scope of work did not involve an inventory and/or inspection of each facility on every pole within affected EAI distribution circuits. The inspections performed by USS included:

- (i) Measurements taken of cable plant to the closest energized facility at the pole only in instances where the required clearances could not be readily determined by observation from the ground;
- (ii) Measurements taken of mid-span clearances again only for instances that these clearances could not be readily determined by observation from the ground;
- (iii) Check for proper anchoring and guy wires; and

208. Check for proper bonding.

209. Global Positioning System ("GPS") equipment was utilized solely to assist the Complainants in locating poles and to provide distances between poles for pole loading analysis, if necessary. GPS units were necessary since there was not a numbering system for poles

implemented.³⁹⁴ Comcast also required maps as a condition of any payment to be made by Comcast of inspection costs, which required use of GPS units. The alternative would have been the use of an old fashioned "wheel" which is much less accurate in measurement of distances and location of poles and at a much greater cost to the Complainants. It should be noted that the use of GPS was of no particular benefit to EAI since its mapping system is not compatible with the use of GPS coordinates.³⁹⁵

210. Digital photographs were taken to document the violations found on a date certain during the safety inspection and to assist the Complainants in locating poles with violations. The use of digital photographs:

- (i) Minimizes field visits by the Complainants and EAI in discussing existing conditions;
- (ii) Minimizes field visits by designers/engineers when make-ready work is required;
- (iii) Aids in dispute resolution regarding violations and responsibilities;
- (iv) Facilitates discussions of existing plant conditions subsequent to field inspections; and
- (v) Facilitates quality control of work performed by field inspections.³⁹⁶

211. The use of GPS and digital photographs represent cost saving measures taken for the benefit of the Complainants in locating poles and reviewing existing violations found in the field. This is especially so since none of the Complainants had adequate strand maps of their cable

³⁹⁴ Declaration of Tony Wagoner at ¶¶ 7, 9, 11.

³⁹⁵ Declaration of Tony Wagoner at ¶ 9.

³⁹⁶ Declaration of Tom Wagoner at ¶ 8.

plant.³⁹⁷ EAI denies that the inspections results were defective as alleged in Paragraph 29 of the Complaint.

212. EAI denies the allegations of **Paragraph 30** of the Complaint.

213. EAI denies the allegations contained in **Paragraph 31** of the Complaint. EAI affirmatively states that EAI has consistently advised Comcast and Alliance that EAI will allow attachments to be made to specific circuits at such time as Comcast or Alliance, as the case may be, clears the specific circuit of reported violations. Otherwise, Comcast and Alliance have made a practice of cherry picking and/or limiting the safety violations which they choose to correct to those violations requiring the least amount of time and expense to correct leaving the more egregious and expensive repairs left uncorrected.³⁹⁸ EAI has required the Complainants to correct the safety violations reported within a distribution circuit before allowing more attachments to be made within that particular circuit for reasons of safety to the public, reliability of the electrical system, and for engineering purposes. EAI has a statutory duty to operate and maintain its systems in compliance with the NESC and safeguard persons and property from the hazardous nature of operating an electrical distribution and transmission system.³⁹⁹ Some of the safety violations which have been reported to the Complainants involve inadequate clearances, bonding, anchors and guy wires. Proper clearances and bonding must be maintained between cable facilities and electrical facilities to prevent electrical contact of qualified employees of EAI

³⁹⁷ Declaration of David B. Inman at ¶ 25; Declaration of Tony Wagoner at ¶ 9.

³⁹⁸ See Violation Progress Reports of Comcast, Alliance and WEHCO attached as Exhibits "82," "83" and "84," respectively; Declaration of John Tabor at ¶ 22.

³⁹⁹ See rules 8.01 and 8.02 of the General Services Rules of the Arkansas Public Service Commission and Rule 4.02 of the Special Rules – Electric of the Arkansas Public Service Commission.

and the non-qualified, untrained employees, contractors and subcontractors of the Complainants when cable plants become energized as a result of voltage induction.⁴⁰⁰ Minimum vertical clearance must be maintained over streets, roads and driveways to prevent poles and energized electric wires from being pulled down when a vehicle comes in contact with a low hanging television cable.⁴⁰¹ Separate guy wires and anchors must be placed by the Complainants to ensure that poles and whole pole lines do not begin to lean, break or collapse under normal load conditions and heavy load conditions caused by ice and high winds.⁴⁰²

214. The Letter from Webster Darling to John Brinker, Vice President of Operations, Alliance, dated December 16, 2002, referenced in footnote 9 to Paragraph 31 of the Complaint provided that no further attachments on poles owned by EAI would be allowed until Alliance had taken affirmative and substantial steps to correct reported violations and that firm arrangements are made by Alliance concerning payment of the USS invoices.⁴⁰³ This is far from the mischaracterization of this letter alleged by Complainants that EAI refused new attachments to poles until each and every pole in each and every circuit is brought into compliance and until all USS and EAI charges are paid in full. Again, Alliance and counsel for Alliance have been consistently and repeatedly advised that once a particular circuit is cleared of reported safety violations, further attachments would be allowed on a particular circuit.⁴⁰⁴ The fact remains

⁴⁰⁰ See Brandon Holmes vs. Gill, et. al., Independence County, Arkansas Circuit Court Case No. CV-2003-45-4, Second Amended Complaint and related documents at Exhibit "43."

⁴⁰¹ See Comcast, Alliance and WEHCO Trouble Tickets, attached as Exhibits "90," "91" and "92," respectively.

⁴⁰² Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶¶ 39, 40.

⁴⁰³ See Letter of Webster Darling, Senior Counsel, EAI, to John Brinker, Vice President of Operation, Alliance, dated December 16, 2002 attached as Exhibit "39."

⁴⁰⁴ Declaration of David B. Inman at ¶ 23.

neither Comcast, Alliance nor WEHCO have taken any substantive steps to correct reported safety violations.⁴⁰⁵

215. EAI denies the allegations contained in **Paragraph 32** of the Complaint. EAI affirmatively states that the Complainants have misstated and mischaracterized EAI's position with respect to new attachments. EAI has never required the Complainants to correct violations for each and every pole in each and every circuit, nor required the Complainants to pay all USS and EAI charges in full as alleged in Paragraph 32 of the Complaint. Again, as stated above in response to Paragraph 31 of the Complaint, EAI has consistently advised Comcast and Alliance that new attachments would be allowed in a distribution circuit once the particular circuit is cleared of reported safety violations. This has been the position of EAI for reasons of safety, reliability and engineering purposes affecting each distribution circuit owned by EAI. As stated above, beginning in December 2004, and January 2005, Alliance and Comcast began submitting applications for new attachments to EAI which have been appropriately processed and approved.⁴⁰⁶ As a part of this permitting process, EAI has required Alliance and Comcast to correct violations of the NESC on attachment poles and adjacent poles. However, Comcast in particular, has objected to clearing these NESC violations which pose dangers to its workers making the attachments and the general public. Again, Comcast specifically has refused to take

⁴⁰⁵ Declaration of Wilfred Arnett at ¶ 33; Declaration of John Tabor at ¶ 22; See violation Progress Reports of Comcast, Alliance and WEHCO attached as Exhibits "82," "83" and "84," respectively.

⁴⁰⁶ See Declaration of Brad Welch at ¶¶ 25, 26.

any substantive steps to clear its plant of NESC violations due to attachments made on EAI poles.⁴⁰⁷

216. EAI denies the allegations of **Paragraph 33** of the Complaint.

217. EAI denies the allegations contained in **Paragraph 34** of the Complaint. EAI affirmatively states that, if anything, the Complainants' shoddy construction practices and unsafe attachment conditions have caused ratepayers of EAI to absorb costs of repairs for damages to EAI facilities caused by cable plant and the loss of good will of customers of EAI due to electric service outages suffered by EAI's customers due to the condition of cable plant.⁴⁰⁸

218. EAI denies the allegations contained in **Paragraph 35** of the Complaint. EAI affirmatively states that Comcast, in typical fashion, has made cable attachments to poles owned by EAI to serve the subdivision referenced in Footnote 12 of the Complaint without making application or receiving permission from EAI for these attachments.⁴⁰⁹ The portion of Circuit V130 involved is located along 2.3 miles of State Highway 10 beginning at the intersection of Highway 300 traveling West. In a weekly meeting held with USS and Comcast, Marc Billingsley of Comcast asked John Tabor of USS for approval of a permit for this portion of Circuit V130. John Tabor informed Mr. Billingsley that a permit would be issued for the additional attachments once Circuit V130 was cleared of violations by Comcast. Comcast, without permission, made the attachments anyway. These unauthorized attachments involved 68 poles of which 17 poles were found to have violations involving cable too close to energized

⁴⁰⁷ Declaration of Gary Bettis at ¶¶ 25, 26.

⁴⁰⁸ See Comcast, Alliance, and WEHCO Trouble Tickets attached as Exhibit "90," "91" and "92," respectively.

⁴⁰⁹ Declaration of John Tabor at ¶ 9.

facilities. Comcast was aware of the violations at the time the unauthorized attachments were made to these poles.⁴¹⁰ These violations were not corrected by Comcast at the time these unauthorized attachments were put in place. This is a clear example of how Comcast has shown not only a total disregard of the permitting process, but most importantly, Comcast has knowingly placed its employees, contractors and subcontractors in eminent danger of electrocution by unsafe attachment conditions for the sake of providing service to a 180 home subdivision.⁴¹¹

219. Comcast's willingness to proceed with attachment work under unsafe conditions and total disregard for the safety of its construction workers, contractors and subcontractors is also evidenced by letter dated September 11, 2003, from Steven K. Gitzen, Comcast Project Manager, to Terry Allgood with Walton EMC.⁴¹² In this letter, Mr. Gitzen represented that Comcast understood that make-ready work was required to be completed as part of making new attachments and overlashing in order to correct NESC violations. However, Comcast agreed not to hold Walton EMC responsible for any injuries or damages which may be incurred during the work performed to allow Comcast to proceed with the work before NESC violations had been corrected. Specifically, Mr. Gitzen states in his letter that Comcast understands that personnel would be working in situations where safety issues exist and Comcast would not hold Walton EMC responsible for any injuries or damages incurred during the work.⁴¹³ This shows a pattern

⁴¹⁰ *Id.* at 9.

⁴¹¹ See documents and before and after photographs evidencing these unauthorized attachments made by Comcast for service to the referenced subdivision attached as Exhibit "40."

⁴¹² See letter dated September 11, 2003 from Steven Gitzen to Terry Allgood, Exhibit "79."

⁴¹³ *Id.*

of blatant disregard for the safety and well being of contractors and subcontractors working for Comcast.

220. EAI denies the allegations of **Paragraph 36** of the Complaint.

221. EAI denies the allegations contained in **Paragraph 37** of the Complaint. EAI affirmatively states that with the exception of certain rebuild projects performed by Cox noted above, EAI did not receive any notification from any other Complainant of any upgrade or rebuild work either before construction was commenced or after construction was completed. EAI further pleads that the safety inspections were performed as a result of continuous damages suffered to EAI pole plant facilities, electrical service outages and emergency calls received from customers caused by the poor and unsafe conditions of the cable plant. EAI also states that EAI has allocated to itself and paid \$780,115 or 33% of the total inspection costs. EAI has required specific circuits to be cleared of reported safety violations by the Complainants before allowing further attachments within the circuit for reasons of safety, reliability and engineering purposes as more fully set forth above.

222. EAI is without information sufficient to form a belief as to the allegation that the Complainants have essentially completed their upgrades or construction as alleged in **Paragraph 38** of the Complaint and, therefore, denies the same. EAI denies that Comcast, Alliance and WEHCO each completed upgrades at least one to eleven years before inspections were performed as alleged in Paragraph 38 of the Complaint.⁴¹⁴ EAI affirmatively states that:

⁴¹⁴ Declaration of Thomas Carpenter at ¶ 7; Declaration of Michael Willems at ¶ 14; Declaration of Wayne Harrell at ¶ 22.

(i) In 1999, due to the outdated condition of the cable plant owned by Comcast, the City of Little Rock required Comcast to perform an upgrade of its cable plant.⁴¹⁵ This project involved overlashng additional fiber/coax cable and replacement of all electronic devices (active and passive) to enable an increase in bandwidth. On information and belief, this project was completed in early 2001.⁴¹⁶ No make-ready work was performed as part of this upgrade project. In fact, Comcast told its contractors who performed this upgrade that they were not to look for any make-ready work which needed to be done prior to or as a part of this upgrade to clear violations, nor take any measurements of Comcast plant or other attachers on the poles other than measuring distances between poles, nor note any NESC violations or other dangerous conditions which needed to be corrected prior to or as a part of this upgrade project.⁴¹⁷

(ii) On information and belief, in 1996, Cadron Cable (predecessor-in-interest to Alliance) performed an overbuild of a cable system owned by SouthTel Cable in Greenbrier, Arkansas. Both cable systems were operated contemporaneously for a short period of time until SouthTel Cable was purchased by Cadron Cable and removed. Also, on information and belief, Alliance purchased these cable facilities owned by Cadron Cable in Greenbrier, Arkansas in 1999.⁴¹⁸

(iii) In 1999, Alliance performed an upgrade of cable facilities in Plumerville, Arkansas which involved replacing all electronic equipment and removing the old equipment.⁴¹⁹

(iv) On information and belief, WEHCO performed an upgrade of cable facilities in Searcy, Arkansas from 1993 through 1995. Also, on information and belief, WEHCO added

⁴¹⁵ Declaration of Thomas Carpenter, City of Little Rock at ¶ 56.

⁴¹⁶ Declaration of John Tabor at ¶¶ 6-7.

⁴¹⁷ Declaration of Brent Lewis at ¶ 4; Declaration of John Tabor at ¶ 8.

⁴¹⁸ Declaration of John Tabor at ¶ 15.

⁴¹⁹ Declaration of Bernard Neumier at ¶ 14.

large numbers of power supplies in 1995 and electronic equipment was replaced in 2001 in Searcy, Arkansas.⁴²⁰

(v) On information and belief, WEHCO performed upgrades to and/or rebuilt cable facilities in Pine Bluff, Arkansas and Hot Springs, Arkansas at times unknown to EAI.⁴²¹

EAI states that with the exception of the rebuild projects performed by Cox, no other Complainant notified EAI of any system upgrades or rebuilds of cable plant either prior to commencement of construction or upon completion.⁴²² Also, in August of 2001, Comcast representative, Bob Green, Construction / Maintenance Manager, stated that Comcast had performed an inspection of all 1,200 miles of aerial plant attached to EAI poles in central Arkansas at the rate of 14 miles inspected per day and only found and repaired "discrepancies" at 125 different locations.⁴²³ Nonetheless, EAI continued to experience damages, outages, and emergency calls caused by Comcast cable plant. As a result EAI was compelled to initially hire Wilfred Arnett of USS to conduct a random review of poles in Little Rock.⁴²⁴ Thereafter, EAI hired USS to perform a test safety inspection of two representative Comcast circuits beginning in December 2001.⁴²⁵

223. EAI admits that the inspection of Comcast and Alliance cable plant has been completed with the exception of post-inspection work to be performed when, and if, Comcast and Alliance

⁴²⁰ Declaration of Michael Willems at ¶ 14.

⁴²¹ Declaration of Wayne Harrell at ¶ 22.

⁴²² Declaration of Gary Bettis at ¶ 12; Declaration of Michael Willems at ¶ 14; Declaration of Wayne Harrell at ¶ 23.

⁴²³ See Comcast Action Plan dated April 20, 2001, and Follow-Up Comcast Action Plan dated August 21, 2001, attached as Exhibits "21" and "23," respectively.

⁴²⁴ Declaration of Wilfred Arnett at ¶ 5.

⁴²⁵ Id.; See Comcast Trouble Tickets attached as Exhibit "90."